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No. 674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

VILLAGE OF RIDGEFIELD PARK, *et al.*,
Appellants,

vs.

BERGEN COUNTY BOARD OF TAXATION, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS.

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March 15, 1961

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

Brief in Opposition to Motions to Dismiss.

Pursuant to United States Supreme Court Rule 16(3), appellants file this brief in opposition to both a motion to dismiss made by the Attorney General of the State of New Jersey on behalf of appellees Bergen County Board of Taxation and its individual members and a motion to dismiss or affirm made on behalf of appellee Charles B. Bleasby, Treasurer of Bergen County.

Counter Statement.

In order to clarify, correct or amplify the Statement made by the Attorney General in his motion to dismiss, appellants here, as briefly as possible, append a Counter Statement of the Case, to be also considered as supplementary to the Statement of the Case made in the Jurisdictional Statement previously filed.

The Attorney General refers, under Statutes Involved, to a "substantial" revision of the statutes cited by appellants, and by footnote discusses the changes made (Attorney General's Motion, hereinafter Att. Gen. Mot., pp. 5-6). Obviously, the new laws, New Jersey Laws 1960, Chapter 51, are not involved; they are applicable only to the future (1962 and thereafter). Moreover, the validity of the new Act is somewhat problematical; suit has already been commenced attacking this legislation (*Switz* v. *Kingsley*, filed January 6, 1961).

In addition, it is interesting to note the Attorney General's reference to the before and after equalization assessed value of Bergen County properties (Att. Gen. Mot. p. 13). He notes a grand total, after the alleged equalization, of over $4,250,000,000, of which over $4,140,000,000 was *equalized* (from over $1,000,000,000) real property assessment. Personalty was but $135,800,000 —both before and after equalization.

These figures stress the importance of either equalizing personal property assessments or requiring true (or, at least, a common) value assessment. This is emphasized when, as the trial court found by implication (Juris. State. App. pp. 66a-70a), the total assessed values for personalty appear to have been submitted, pro rata, even further from true value than real property assessments, and at greater variances from each other.

The Attorney General then concedes that, had personal property assessments been submitted at true value or equalized, appellants would have been saddled with less of the county tax burden. This, he says, is a "mathematical truth" (Att. Gen. Mot. p. 14).

It is more than that. It is a practical truth and a constitutional violation. When statutes, as construed by the highest state court, *require* such a result, they are unconstitutional as violative of the Fourteenth Amendment. And unconstitutional statutes are no statutes at all. Taxation, of course, requires a legislative—a *valid* legislative—basis.

It is important to note throughout that the factual findings of the trial court (see especially Juris. State. App. pp. 26a to 29a; 38a to 41a; 65a-70a (61 N. J. Super. 170, 160 A. 2d 316)) have never been challenged by any of the appellees and were accepted by the New Jersey Supreme Court in its opinions (Juris. State. App. A.).

Thus, it is factually established, *inter alia*, without contradiction, that there was "a complete lack of uniformity in assessing the value of personal property as between taxing districts, and, in general, within each district" (Juris. State. App. p. 66a), and moreover, that the County Board of Taxation ascertained the percentage of true value used by every taxing district, including appellant Ridgefield Park (107.35%), but refused to apply the factor to this appellant since it would have lowered Ridgefield Park's share (Juris. State. App. p. 69a).

On the other hand, in Ridgefield Park, "both the real and the personal property were assessed at their full 'true value', according to the best of the assessor's ability and judgment, after a diligent inquiry and investigation had been made" (Juris. State. App. p. 66a).

It is unclear to appellants whether the Attorney General seeks to imply that the federal questions here involved were

not properly preserved (see Att. Gen. Mot. p. 15). The federal questions were directly raised in appellants' Answer in the *Bleasby* case, which action was consolidated with the *Ridgefield Park* case (Juris. State. App. pp. 92a to 93a), both of which were decided in the New Jersey Supreme Court decision from which this appeal is taken (Juris. State. App. p. 16a)—as indeed, the Attorney General, himself, earlier noted (Att. Gen. Mot. p. 4).

Furthermore, with respect to this point, the opinions of the trial court are replete with references to, and holdings upon, Federal constitutional questions (Juris. State. App. B). The absence of any similar references in the decisions of the Supreme Court of New Jersey does not eliminate the federal questions.[1]

The Attorney General also makes reference in his Statement to the demand for relief in the appellants' complaint in the *Ridgefield Park* suit (Att. Gen. Mot. pp. 15-16) and the pretrial order (*Ibid*, p. 16), and alleges that no refund was demanded by appellants.

However, he fails to add that, at that time, no refund was necessary since appellants had not transferred any funds to the county; that, in appellees' suit (the *Bleasby* action) for the funds, which was consolidated with the *Ridgefield Park* suit, the appellants defended with sixteen

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[1] See, *e.g.*, New York ex rel. Bryant *v.* Zimmerman, 278 U. S. 63, 67 (1928) ("There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.") Davis *v.* Wechsler, 263 U. S. 22, 24 (1923) ("• • • the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.") Compare General Oil Co. *v.* Crain, 209 U. S. 211, 220-228 (1908).

separate defenses and also counterclaimed for further relief under the Declaratory Judgments Law (N. J. S. 2A:16-51 *et seq.*); and that appellants did not pay the funds over to the county, but into Court from which they were paid over to the County "without prejudice to any rights in connection therewith which they [appellants] may hereafter establish" (Appendix A).

Thus, appellants technically do not seek a refund, for they have not truly paid the tax. Appellants' point is this: A tax purportedly levied under unconstitutional statutes is not collectible in the first instance.

Finally in regard to this point, appellants would note the jurisdiction, power and duty of the courts of New Jersey to accomplish substantial justice—whatever the demand.

The Attorney General now also attacks the appellants' contention that, in real property assessments, Ridgefield Park would have been found to be at 107.35% of true value *if* the County Tax Board had equalized Ridgefield Park's assessments along with the other 69 districts (Att. Gen. Mot. p. 18).

His attack comes late. This fact was a specific finding of the trial court (Juris. State. App. p. 69a), and was not challenged on appeal. It was accepted by the New Jersey Supreme Court (Juris. State. App. A).

In his Summary of Argument the Attorney General also contends that the tax statutes of New Jersey are constitutional under the Federal Constitution. They "*require*", he states, "assessment of *all* taxable property *uniformly* at *true* value" (Att. Gen. Mot. p. 20, emphasis added).

We agree—almost. As written, they did. But, the validity of statutes under the Federal Constitution is

measured by the manner in which they are construed and enforced by the highest state court.[2]

Thus, as construed, the statutes require, in effect, non-uniform taxation because among other things, the County Tax Board, in apportioning the county tax burden, must accept the various personal property assessments as submitted by the various assessors who, admittedly, assess at various percentages of true value (see Juris. State. pp. 16-18).

Argument.

A. As to the Argument of the Attorney General:

I.

Under prior decisions of this Court, the judgment appealed from is final.

The Attorney General, under his Point I (Att. Gen. Mot. pp. 23-26), contends that the judgment is not final for purposes of review. In this contention he is in error.

The New Jersey Supreme Court held, in its second review, that even though the appellants had established factually the deliberate and intentional unequal, non-uniform and discriminatory taxing structure applicable to the apportionment of the county tax burden due to non-equal and non-uniform personal property assessments being one factor in the apportionment and non-equalized real property assessments of only Ridgefield Park being another factor, and that the tax statutes (as construed) required this result, nonetheless the appellants would be ordered to pay such a levy (Juris. State. App. A).

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[2] See Juris. State. p. 16 at n. 1.

Nothing remains to be done, other than ministerially. Appellants are ordered to pay a totally unconstitutional tax levy of $192,912.58. No damages are to be determined. No other issue is involved on this appeal; no other issue is presently pending.

The Attorney General stresses a mandamus issue yet unresolved. It is not involved in this appeal. It is purely ministerial. And it may become moot if the 1960 tax legislation is valid.

Even if the issue of mandamus were a real one, it is separable. *Cf. Clark* v. *Williard,* 292 U. S. 112 (1934). Mandamus involves an act *to be* performed. This suit, as the New Jersey Supreme Court has resolved it, involves the demands made upon appellants for the 1959 tax year.

Finality may, of course, be determined by the *opinion* of the Supreme Court of New Jersey as well as by the formal order it entered. See *Clark* v. *Williard, supra,* at page 118 of 292 U. S.

This matter could scarcely be more final. The New Jersey Supreme Court has finally adjudicated that appellants must pay (and, under court order, the County has received) the unconstitutional share of the unconstitutional county tax burden.

It is a more final situation than either *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63 (1928)[3] or *Badini Petroleum Co.* v. *Superior Court,* 284 U. S. 8 (1931).[4]

Even if it were true, the "fact that all phases of the litigation are not concluded does not necessarily defeat our jurisdiction". *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 77 (1948) (dissenting opinion). Certainly, the

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[3] In which the state court denied *habeas corpus* which attacked a statute's validity thus requiring trial of the accused.

[4] In which the state court denied a writ of prohibition restraining an inferior state court from enforcing its injunction.

judgment sought to be reviewed has *fully determined the rights of the parties.*

See also *Radio Station W O W* v. *Johnson*, 326 U. S. 120 (1945); *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287 (1941).

Finally, the decision of this Court in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1949), cited at Juris. State. p. 6, is surprisingly apposite. This was an action for refund of an unconstitutional tax; it was tried without factual challenge. The Supreme Court of California, reversing the lower court, sustained the tax. This Court considered the decision final because of the unchallenged status of the facts, which is also this case,[5] and the conclusion that the highest state court had passed on the issues which control the litigation, which is also this case.[6]

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[5] It has been noted, above, that the factual findings of the trial court in this case have been accepted and unchallenged.

The trial took a month; there is nothing remaining to be proved. Appellants have proved all they can. There will be no further trial of facts.

The statement in the Attorney General's Motion that "despite two appeals to the New Jersey Supreme Court, the evidence introduced during the month of trial has not yet been brought before that court" (Att. Gen. Mot. p. 26) must have been an embarrassing experience. The appeals to the New Jersey Supreme Court were *his*, among others, appeals. The Rules of the New Jersey Courts require an appellant to have the record below, including the transcript, prepared and filed with the appellate court. R. R. 1:2-8.

Here the appellants (appellees in this action) did not comply. The facts as found must have been acceptable to them and accepted by them and the Supreme Court of New Jersey. The attack on the facts now does not lie well in their mouths.

[6] See Juris. State. and Appendices A and B thereof.

II.

The questions presented by this appeal are substantial.

Appellants will not here repeat their contentions raised in the Jurisdictional Statement filed herein.

However, with regard to Part A of Point II of the Attorney General's Motion (Att. Gen. Mot. pp. 27-29), it must again be repeated that such factual allegations as therein made are not in order.

The facts were found by the trial court after a one-month trial. In his appeal to the New Jersey Supreme Court, despite the local practice rules to the contrary,[7] the Attorney General failed to prepare and file any record on appeal. He was then willing to base his appeal on the written opinions of the trial court and facts therein stated—and the New Jersey Supreme Court was willing to decide it on that basis. Thus, his differing factual claims come too late.

With regard to Part B of Point II (Att. Gen. Mot. pp. 29-26) appellants would merely note the irrelevancy of the examples produced by the Attorney General's imagination. This case and this appeal are based upon established facts. The Attorney General is bound, now, to live with them, just as the appellants were.

Further, his examples seem to prove the old adage: Do not do more than you must, for you may do less than you should.

Finally, with regard to that portion of his argument at Att. Gen. Mot. p. 33, appellants would remind the Attorney General that wars have been fought only too recently to prevent outsiders from destroying our democratic and

[7] Revised Rule 1:2-8, and see fn. 5 *supra*, at page 8.

constitutional government. Expediency should not now dictate the same result. Only *constitutional* government should function and to that end have funds—not *un*constitutional government.

III.

The decision of the New Jersey Supreme Court squarely presents the federal questions sought to be reviewed and does not rest on any adequate non-federal ground.

The Attorney General suggests that an alleged failure to exhaust administrative remedies provides an adequate non-federal basis for the decision of the Supreme Court of New Jersey.

First the administrative agency here involved would have no power to resolve the constitutional issues which are herein presented.[8]

Second, questions of law are involved and are generally considered best resolved by courts of law, with or without administrative exhaustion.[9]

Third, and most importantly, the law of this case is to the contrary.

Thus, on the first appeal to the New Jersey Supreme Court, when the matter was affirmed and remanded for trial, that court specifically held that exhaustion of administrative remedy played no role in this case. See Juris. State. App. 1a-11a, noting especially 4a-5a.

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[8] Hillsborough Township v. Cromwell, 326 U. S. 620, 625 and the cases (N. J.) cited therein at fn. 3 (1946).

[9] See, *e.g.* Nolan v. Fitzpatrick, 9 N. J. 477, 89 A. 2d 13 (1952).

B. As to the Argument of the County Treasurer:

I.

This appeal presents substantial federal questions.

The County Treasurer's motion to dismiss or affirm, hereinafter C. T. Mot., apparently misconceives the nature of this appeal.

Appellants do not literally seek a refund; they seek an adjudication that an alleged tax levied under unconstitutional statutes, as construed, may not be collected.

The clear answer to much of the County Treasurer's argument is contained in a most recent New Jersey Supreme Court decision. Thus, in *In re Appeals of Kents 2124 Atlantic Ave., Inc.*, 34 N. J. 21, A. 2d (1961), the Court said:

> The city [here, the county] in substance argues that the picture is too chaotic to permit any relief. It would be a sad reflection upon the judiciary and indeed upon all government if the rights of a taxpayer were to be diminished in proportion to the violence of the assault upon them. • • • And that remedy should not be a will-o'-the wisp; it must be within the practical reach of the victim.

At p. 30 of 34 N. J.

Then, despite the burden placed upon appellants in this case of establishing personal property valuations throughout Bergen County and showing Ridgefield Park's share thereof, the Supreme Court of New Jersey in that case decided a similar burden only within a single taxing district was a denial of remedy. Thus:

> • • • except where a municipality has made a complete revaluation, parcel by parcel, and has

> implemented that work-product, a common level, in the sense of a single ratio to true value at which the bulk of the ratables is assessed, cannot readily be shown if indeed one exists.
>
> • • • The injured taxpayer is entitled to practical relief.

At pp. 26, 32 of 34 N. J.

The final paragraph at C. T. Mot. p. 6 sums up nicely the argument of appellants in this appeal—and is apparently joined in by appellee County Treasurer.

Further, is not the simple answer to the long quotation at C. T. Mot. p. 7 to require assessors to assess personal property at true (or a common) level in the first place (which was actually the legislative language prior to the erasive construction of the New Jersey Court)?

The answer to C. T. Mot. p. 8 is likewise simple: Unconstitutional government ought not to function.

With regard to the final paragraph of Point I of the County Treasurer's motion (C. T. Mot. p. 8), appellants are necessarily confused. Having noted that we are not dealing with municipal monies (C. T. Mot. p. 3), the County Treasurer then states that the municipality is the real party in interest (C. T. Mot. p. 8). It is—but only in the sense of a trustee of its citizens' funds; local governmental units are designed to represent local people.

Lastly, it is stated that the County Tax Board is acting as part of the State's administrative system for collecting taxes (C. T. Mot. p. 8). This is directly contradicted in the Attorney General's motion (Att. Gen. Mot. pp. 6-7).

II.

There is no non-federal basis to the judgment sought to be reviewed.

If appellants correctly understand appellee County Treasurer's argument under his Point II (C. T. Mot. pp. 9-10), it is that the trial court lost jurisdiction when it allegedly entered a judgment contrary to the mandate of the New Jersey Supreme Court.

It is standard hornbook law requiring no citation that an inferior court, if erroneous in judgment, does not lose jurisdiction. It merely made a mistake.

Constitutionally speaking, it is the trial court which acted properly in this case, and not the Supreme Court of New Jersey.

Conclusion.

For the reasons hereinabove and hereinbefore given in the Jurisdictional Statement, appellants respectfully urge this Court to dismiss the motions made to dismiss or affirm, and to note probable jurisdiction in this appeal.

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APPENDIX A

Order Directing Payment of Funds.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

DOCKET NO. L-16939-58 PW

CHARLES B. BLEASBY, County Treasurer of the County of Bergen
Plaintiff,

vs.

HAROLD J. JONES, Collector-Treasurer and THE BOARD OF COMMISSIONERS of the Village of Ridgefield Park
Defendants.

Civil Action

On motion of Milton T. Lasher, Esq., attorney for the plaintiff, in the presence of William R. Morrision, Esq., appearing for Morrison, Lloyd & Griggs, Esqs., attorneys for the defendants.

It is on the 7th day of March, 1960, ORDERED, pursuant to leave contained in the Order in this cause of the Supreme Court, dated February 15, 1960, that the Clerk of the Superior Court pay to the plaintiff the moneys heretofore deposited with him in this cause by the defendants, without prejudice to any rights in connection therewith which they may hereafter establish.

/s/ D. M. WAESCHE
DONALD M. WAESCHE
J. S. C.